IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ANGELA DRAKE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**Civil Action No. 4:16-CV-497**
CAPITAL ONE, NATIONAL ASSOCIATION,	§	
	§	
	§	
Defendant.	§	

PLAINTIFF'S SURREPLY TO DEFENDANT'S MOTION TO COMPEL INDEPNDENT MENTAL EXAMINATION OF PLAINTIFF AND MOTION TO STRIKE REPLY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff, Angela Drake ("Plaintiff" or "Drake"), and files *Plaintiff's Surreply to Defendant's Motion to Compel Independent Mental Examination of Plaintiff and Motion to Strike Reply*. In support thereof, Plaintiff would respectfully show the Court as follows:

Motion to Strike Defendant's Reply

Defendant makes numerous unsupported claims in its *Reply* without attaching supporting documents. Local Rule CV-7(b) could not be clearer:

> When allegations of fact not appearing in the record are relied upon in support of a motion, all affidavits and other pertinent documents shall be served and filed with the motion. It is strongly recommended that any attached materials should have the cited portions highlighted or underlined in the copy provided to the court, unless the citation encompasses the entire page. The page preceding and following a highlighted or underlined page may be submitted if necessary to place the highlighted or underlined material in its proper context. Only relevant, cited-to excerpts of attached materials should be attached to the motion or the response.

This Defendant did not do, and therefore its *Reply* brief must be stricken.

Surreply

More smear than substance, Defendant's Response fails to establish that Defendant is entitled to an order from this Court directing Plaintiff to undergo an eight-hour, unbounded, largely unexplained, mental health examination. Fed. R. Civ. P. 35 imposes two requirements to justify an independent medical examination. First, Plaintiff's mental health must be "in controversy." Second, good cause must exist to justify the mental health examination. Defendant's effort fails on both counts.

Without citing any authority whatsoever, Defendant makes the bold argument that by asserting a disability discrimination claim, Plaintiff has placed her mental health "in controversy" for purposes of Rule 35. First, the question of "disability" is not a medical one, but a legal one. Courts have observed that the legal definition of "disabled" under the ADA is quite distinct from the colloquial meaning of "disabled," and the determination of whether one is disabled within the meaning of the statute is based on the technical specifications of the statute, regulations, and relevant case law. *See, e.g.*, *Haley v. Community Mercy Health Partners*, 2013 U.S. Dist. LEXIS 11193, at *33 (S.D. Ohio, Jan. 28, 2013). Courts do not consider a physician's opinion probative on the question of whether one is disabled under the ADA; if they did there would be no role for the courts and a determination of disability would be a simple matter. Instead, courts apply the express language Congress put into the statute, which is found in 42 U.S.C. § 12102(1)(A).

Second, even if Defendant's retained physician were qualified to make a determination of disability under the ADA, which he is not, such a determination would only shed light on whether Plaintiff *currently* suffers from a disabling condition, not whether she suffered from one while employed by Defendant. Interpreting *Schlagenhauf v. Holder*, 379 U.S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234 (1964), the seminal case on Rule 35, the court in *Sarko v. Penn-Del Directory*, 170

F.R.D. 127, 131 (E.D. Pa. 1997) noted that courts tend to order such examinations where … "the plaintiff alleges that he suffers from a severe *ongoing* mental injury or psychiatric disorder … ." (Emphasis in original). Such is not the case here; although Plaintiff is seeking garden variety mental anguish damages, she is not claiming that Defendant's unlawful conduct resulted in some type of mental "injury" or "psychiatric disorder." In fact, as Defendant went to great lengths to chronicle, Plaintiff's experience with mental illness predates her employment with Defendant. Moreover, as noted in Plaintiff's *Response*, Defendant already determined that Plaintiff suffered from a disability while employed by Defendant when it granted Plaintiff's request for a reasonable accommodation pursuant to the ADA. The sole purpose of Defendant's mission to subject Plaintiff to an independent mental examination is to harass and embarrass her, as demonstrated by the contents of Defendant's *Reply*, and the manner in which it was filed.[1]

In spite of Defendant's attempt to muddy the water with unnecessary and unsupported details of Plaintiff's private life and ad hominem comments about Plaintiff's counsel, the decision before the Court is very simple. Courts have found that a Plaintiff has placed her mental health condition "in controversy" in four scenarios: (1) by stating a tort claim for intentional or negligent infliction of emotional distress, (2) by alleging a specific mental or psychiatric injury or disorder, (3) by alleging unusually severe emotional distress, (4) by intending to offer expert testimony to support a claim for emotional distress damages, and/or (5) conceding that his or her mental condition is in controversy. *See, e.g.*, *Ortiz v. Potter*, 2010 U.S. Dist. LEXIS 20291, at *2-3 (E.D. Cal. Mar. 5, 2010), *Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995), *Jarrar v. Harris*,

[1] Defendant's *Reply* made repeated reference to the contents of Plaintiff's medical records, which the parties agreed would be treated as confidential and filed under seal. Despite this agreement, Defendant's counsel filed the *Reply* on PACER, unsealed, for all the world to see. Although Defendant's counsel has taken steps to have the filing placed under seal, the damage to Plaintiff had already been done, and there is simply no way to know who has viewed the *Reply*.

2008 U.S. Dist. LEXIS 57307, at *3-4 (E.D.N.Y July 25, 2008); *Chase v. Nova Se. Univ., Inc.*, 2012 U.S. Dist. LEXIS 73887, at *13-15 (S.D. Fla. 2012). Here, Plaintiff has not asserted a tort claim for intentional or negligent infliction of emotional distress. She is not alleging that Defendant has caused a specific mental or psychiatric injury or disorder. She has not alleged unusually severe emotional distress. She will not introduce expert testimony to support a claim for emotional distress damages, and she has not conceded that her mental condition is in controversy.

The cases cited by Defendant do not aid its position. For example, in ultimately finding that the movant did *not* meet the burden imposed by Rule 35, the Supreme Court, in *Schlagenhauf v. Holder*, 379 U.S. 104, 165 (1964), observes that "[m]ental and physical examinations are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the Rule." While the *Schlagenhauf* court acknowledged that there are situations where the pleadings alone are sufficient to meet the requirements of Rule 35, the examples provided by the Court – that of a plaintiff in a negligence action who asserts a resulting mental or physical injury or an insanity defense in a divorce action – obviously couldn't be more different than the circumstances here. In *Gavin v. Hilton*, 291 F.R.D. 161 (N.D. Ca. 2013), the Court ordered an independent mental examination after applying the factors enumerated above, and, after noting that the complaint included a claim for intentional infliction of emotional distress, that the plaintiff alleged that she suffered from a specific mental disorder, and that plaintiff alleged that the movant's conduct caused her to experience severe adverse mental and physical effects, causing her to be hospitalized on multiple occasions and to attempt suicide. Because the plaintiff based their claim on a mental disability, and sought damages based on this severe mental distress *that continued to that day*, the Court found that the plaintiff had placed her mental state in controversy.

These circumstances are not present here. Plaintiff has not alleged a claim based on intentional infliction of emotional distress. She has not alleged that Defendant's unlawful conduct has caused her to suffer a specific mental disorder. She has not claimed that the disabling condition that forms the basis of her claims even continues today. Similarly, in *Morton v Haskell*, the Court observed that an ordinary claim for mental distress did not place the plaintiff's mental state in controversy. As the Court observed, "a person with no "mental condition" may still suffer emotional distress which is compensable." *Id.* at *5. In *Morton* the plaintiff claimed severe clinical depression as the result of the defendant's unlawful conduct. Here, Plaintiff has made no such claim. Instead, Plaintiff has alleged only garden-variety emotional distress. In *Parker v. Univ. of Pa.*, 128 F. App'x 944, 947 (3d Cir. 2005), the Court of Appeals considered only whether it was proper for the district court to dismiss the Plaintiff's ADA claim because he refused to attend a Rule 35 mental examination. It is not clear from this opinion the circumstances that led the district to order the independent mental examination in the first place.

Defendant fails to establish that good cause exists to justify its proposed mental examination. Again, without providing any authority, Defendant claims that good cause exists to require the examination because Plaintiff claims that Defendant's conduct caused or worsened Plaintiff's emotional distress. While this is really an argument going to the "in controversy" requirement, it fails under either analysis. Plaintiff has not alleged damages deriving from Defendant's conduct that caused or worsened her emotional distress. This is mere background for why Plaintiff took FMLA leave while employed by Defendant, which set in motion the discriminatory events that *do* form the basis of Plaintiff's claims. Moreover, the fact that Plaintiff identified her treating physician in her initial disclosures provides no support for Defendant's position whatsoever. Her physician is a fact, not an expert, witness.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on March 3, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following Counsel of Record for Defendant as follows:

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